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Gay-Friendly Legal Scholars Highly Optimistic in Prop. 8 Trial

By Joe Eskenazi in Law & Order Fri., Jan. 29 2010 @ 8:30AM



With arguments set to wrap today in the Proposition 8 trial, a handful of legal scholars advocating for same-sex marriage *SF Weekly* spoke with hammered home two points: Yes, they're more hopeful for a positive ruling now than when the trial started. And, yes, both of the witnesses called by the defense skulked out of the San Francisco courtroom wearing figurative clown suits.

"I am more optimistic than I was," noted **Golden Gate University** professor **Michael Zamperini**. Joan Hollinger, a professor at U.C. Berkeley's Boalt Hall School of Law predicted Judge Vaughn Walker would rule against Prop. 8 -- "if the evidence is taken seriously."

For those who haven't been following the minutiae of the case against Prop. 8 -- the ballot initiative that last year stripped California same-sex couples of the right to marry—the plaintiffs' case is two-pronged. They maintain that the right to marry is fundamental—and it should have to be demonstrated that *not* taking that right away from a specific class of people such as homosexuals would somehow harm the heterosexual majority in order to justify a same-sex marriage ban. The second argument is that the pro-Prop. 8 forces' liberal use of hateful rhetoric and insinuations connecting homosexuals to child molesters led to anti-gay "animus" among voters.

The scholars *SF Weekly* spoke with were more confident in the former argument carrying the day than the latter.

"If the issue is framed as whether, under the federal Constitution, there is a fundamental right to marry, [then] any exclusion from enjoying this fundamental right is subject to at least a higher level of scrutiny," says Hollinger. "The state has to have substantial reason to justify the exclusion. If that's the way it's framed, the plaintiffs, it seems to me, are going to prevail. Easily."

Zamperini, meanwhile, notes that it's precedent-setting to even have this debate—regardless of how Walker rules. "Previously in this area, it would just be 'Everybody knows traditional marriage is one man and one woman and that's a valid reason to keep traditional marriage' and not even bother to listen to someone with a contrary opinion. Now [Walker] is allowing arguments in to say 'No it isn't,'" said the law professor. "To me, allowing debate, allowing experts to be cross-examined is treating it as if we are really going to make a decision based on the facts and not on old, knee-jerk reactions or what our Creator tells us is the right thing to do."



The Prop. 8 trial has not always brought out the best in everyone...

The “animus” question may be a bit more complicated. Attorney Jenny Pizer of Lambda Legal notes that the law is not entirely clear as exactly *who* has to demonstrate animus in order to invalidate a law: Its authors? Its backers? Its voters? And though big-time Prop. 8 activist [William Tam sure seemed to make a terrible impression](#) by spouting on the stand about how homosexuals are more likely to be pedophiles—while having to admit he had no factual basis to make this claim—it may be a tall order to “prove” that millions of voters were expressly motivated by homophobia.

Meanwhile, the question remains how much damage the pro-Prop. 8 forces’ expert witnesses—professor Kenneth Miller and author David

Blankenhorn—actually did to their side. Miller ostensibly set out to prove that homosexuals are augmenting their political strength—yet, astoundingly, listed “churches” as the reliable political allies of California homosexuals. [Under cross-examination he was forced to admit that, yes,](#) the biggest churches in the state not over overwhelmingly supported Prop. 8 but were the heavy lifters behind its campaign. Also, he was forced to admit the rather intuitive point that ballot propositions are often utilized as a means for the majority short circuit the legislature and impose its views on a minority—not the other way around.

No one, however, is more thankful this trial wasn’t televised than Blankenhorn. [He was forced to admit on the stand that homosexuals’ inability to marry](#) actually hurts the state’s children—not a compelling argument against gay marriage, really. And, what’s more, he admitted that his beliefs about marriage actually have no factual basis or grounding in science or history and are, simply, his beliefs.

“Oh, they were an unmitigated disaster. Even the most neutral observer would have to say so,” said Hollinger of the defense witnesses. “Blankenhorn, he is regarded from the defense’s standpoint as their hero. In other cases, they’ve used his nonsense as the basis for winning in a number of state courts. But he was never exposed to direct or cross-examination in these cases. Well—there’s nothing there! I felt sorry for him. It was sort of a joke, and people were really laughing [in court]. How could you not laugh?”

Finally, if Walker follows the conventional wisdom and overturns Prop. 8 -- leading to an inevitable appeal to the 9th Circuit Court and, possibly, all the way to the Supreme Court—what does it mean for the state’s same-sex couples?

Pizer noted that, since the state’s “children and animals have been safe” despite the presence of 36,000 same-sex married couples, perhaps Walker might be inclined to allow Prop. 8 to be overturned during the appeal process—inducing a wedding bonanza.

The other attorneys were dubious of this. Hollinger noted that Walker already turned down the plaintiffs’ request to enjoin implementation of Prop. 8 when this case kicked off. So why change now? “It’s a way to protect himself, too—to demonstrate his own objectivity, caution, and care.”

Zamperini agreed. “Since Walker knows his decision is going to be appealed, he might have his decision stayed until the appeal. He might stay his decision until the appellate process is done rather than immediately toss Prop. 8 out.”

But won’t that likely delay the possibility of same-sex marriage for years and years?

“Yeah, that’s right,” sighed **Zamperini**.